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## CURRENT TOPICS.

The lay press are accustomed to announce with a flourish of trumpets or an outburst of indignation, any legal decision upon any abstruse question, accordingly as it may accommodate itself to their prejudices. This has been shown to a marked degree in the reference of many of the daily papers to the action of Judge Manisty in the Adams-Coleridge libel case. There is considerable interest in this latest sensation in that the great lawyer whom the American bar sought to honor in his visit to our country, is represented as being a cruel persecutor of the daughter of his own blood, merely because she has espoused the cause of him whom she loves, rather than suffer dictation in the choice of her husband by her noble father. Bernard Coleridge the son of the Lord Chief Justice violated Richilieu's advice and wrote a letter to his sister advising her that the man she loved was an adventurer, and made other statements derogatory to his character, which would, if addressed to a stranger, be libellous. The girl handed the letter to her lover and he brought suit against the writer. The court properly held that the communication being one from brother to sister, apparently made in fulfillment of fraternal duty, was privileged, and therefore, it devolved on the plaintiff to show the existence of actual malice, *i. e.* an intention to do wrong by the use of false statements. The case went to the jury, and, they returning a verdict for the plaintiff, the judge promptly set it aside for the reason that no evidence of actual malice was offered. Now the press are all declaiming that if the conduct of the judge be justified, the right of trial by jury is worthless. It is true that the court should not have allowed the case to go to the jury, but it probably entertained a strong hope that they would render a verdict for the defendant and thus relieve it of any duty. But it is so clear a right of the judge to set aside a verdict when it is unsupported by any evidence that it is a matter of wonder that any lawyer should raise his voice in unison with those who, knowing nothing of the law, are presumptuous enough to criticise the judicial action of an able judge, and what is more dangerous, we may say, to impute improper motives to his action. No one is more jealous than we of any rebuff to the jury system. We believe it to be the best tribunal to pass upon facts that has ever been brought into use, but the jury was created to try cases upon evidence, and when there is no evidence, they have no right to take the case. They are empowered to find a verdict based upon the evidence offered to them, but when they arrive at a verdict without evidence, they have transgressed their powers, and the court is entitled to treat their act as a nullity, and act accordingly. That is all Judge Manisty did in this case, and all criticism upon his conduct is without reason.

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A very interesting question in the law of suretyship arose in Mackreth v. Walmesley 51 L. T. N. S. in the English High Court, Chancery Division. A & B bound themselves as co-sureties to secure money borrowed by C, B becoming a party to the transaction by reason of private understanding with the borrower that part of the money borrowed was to be paid to B in satisfaction of the debt owed him. The court conceded that a secret agreement when fraudulent will release the surety as between himself and the parties to the contract, and that it is not always necessary to prove that the concealment was willful and intentional, with a view to the advantage the person so concealing was to receive, but held that the rule which prevails in assurances upon marine and life risks, that the non-disclosure of material facts, although innocent, vitiates the contract, does not apply to contracts of guaranty and denied the claim of the plaintiff to be exonerated from his joint liability as against his co-surety. Said the court:

"Can the fact of the debt owing by the principal to his co-security be material? If so, in every case where a debtor owes money to one surety, the other surety may get rid of his liability if this fact is not disclosed. This, in my opinion, is not maintainable. Then it must be not the fact of the debt, but of the provision made for it, on which the plaintiff must rely. In short, his case is, where a debtor owing to

one surety a sum of money, says to him: "If you will become surety I will pay your debt, or part of it, out of the money I borrow," and this is not disclosed to the co-surety, the latter may avoid his contract. But a fact, the non-disclosure of which enables a surety to obtain this relief, must be a fact which affects his position, so as to make it worse than he supposed. How does the payment of a debt to his co-surety out of the money borrowed injure him? Clearly in this case the object of borrowing would *prima facie* be to provide for the debtor's liabilities. Paying the debt to the co-surety would better enable him to meet his liability as surety, and might be an advantage rather than any disadvantage to the other surety. On this point the case of Hamilton v. Watson (12 Cl. & Fin., 109), to which I have already referred, is of some authority. The suretyship was for an account of the principal debtor with a banker. He was at the time indebted to the bank for a sum which did not come into this account, and the credit guaranteed was applied by the bank to the payment of the old debt. It was held that the non-disclosure by the bank of the existence of the old debt, or of the application of the new credit to pay it, did not enable the surety to escape from his liability. Reliance is, however, placed on the language of the learned Judges in case to the effect that, if there had been a stipulation that the money was to be so applied, it might have affected the transaction; but the case is certainly not a decision that even if there had been such a stipulation the concealment of it would have avoided the contract. There is nothing in the language of the judges from which it can be inferred that they would have held in a case like this that one surety was bound to volunteer the disclosure to the other of this agreement with the debtor.

## SUBSTANTIAL PERFORMANCE OF CONTRACTS.

There are two rules upon this subject, one at law, the other in equity, one the opposite of the other. Which should be made the governing rule? Which has the weight of authority for its support? At law the rule is that a contract must be strictly[1] performed according to its terms. In equity a substantial performance is sufficient, but with the incident of compensation when proper and just.[2] This position is plainly stated and well illustrated in Green v. Low[3] and Lord v. Stephens.[4]

If the equity rule should govern, then that should be the rule under the code system, and if the rule at law should govern, then under the code system the equity rule should be followed because under that system if law and equity conflict the latter is adopted.

*The Common Law Rule.*—It is stated by Story[5] that "the express stipulations of a contract must be exactly performed and a substantial compliance is not sufficient where the time or express manner and details agreed upon are essential and not complied with," and in another place that "the rule is that an agreement must be performed according to its terms as understood and assented to by the parties."[6] This is substantially laid down by all the text writers, and is illustrated in Hill v. School District,[7] where Hill made a written contract with the school committee to build a school house in a particular manner therein specified and to be completed within a certain time. It was urged that the jury should have been instructed that a substantial compliance with the contract was sufficient; but the court said that although no mechanical work is perfect, the question involved is not the perfection of the work, but the performance agreeably to the contract, and that being practicable, good faith requires it done, and that in law where contracts to build in a particular manner are made, substantial compliance is not sufficient, the contract must be performed according to its terms.[8]

*The Equity Doctrine.* Equity looks to and insists upon a substantial as contrasted with a literal performance of a contract. It discriminates between the substance—the essential and material terms—and the non-essential, immaterial and formal part—the non-performance of which does not invalidate the contract.[9] This equity doctrine permeates all kinds of contracts. It permits a vendor to perfect his title to the property sold

[1] Farrer v. Nightengale, 2 Esp. 639; Hibbert v. Shea, 1 Camp. 113; Duffell v. Wilson, 1 Camp. 401.

[2] Halsey v. Graub, 13 Ves. 77; Guest v. Homfray, 5 Ves. 818; Marplock v. Buller, 10 Ves. 306; Vignalles v. Bower, 12 Ir. Eq. 194; Lennon v. Napper, 2 Sch. & Lef. 684; Parkin v. Thorold, 2 Sim. 68; Roberts v. Berry, 3 DeG. M. & G. 284; Oxford v. Provand, L. R. 2 P. C. 135; Ogden v. Fossick, 4 DeG. F. & J. 426; Gervais v. Edwards, Dr. & War. 80; Stocker v. Wedderburn, 3 K. & J. 393; Wilkinson v. Clements, L. R. 8 Ch. 96; Flanagan v. R. Co., L. R. 7 Eq. 116; Stewart v. Metcalf, 68 Ill. 109; Portland v. R. Co. 63 Me. 90; McComas v. Easley, 21 Gratt. 23; Van Arman v. Merrill, 27 Iowa, 476.

[3] 22 Beav. 625.

[4] 1 Y. & C. Ex. 222.

[5] Story Cont. sec. 1321.

[6] Story Cont. sec. 1322.

[7] 17 Me. 316.

[8] The same principle in Allen v. Cooper, 22 Mo. 136; Norris v. School District, 12 Me. 293.

[9] See Pomeroy on Cont. sec. 325; Lord v. Stephens, 1 Y. & C. Ex. 222.

after the time stipulated for the completion of his contract. It allows delay in closing stipulated acts, and in collateral and immaterial matters; but in all such cases compensation will be decreed when a remedial injury or detriment is sustained.[10] And where the contract is divisible, as where there are essential and non-essential elements contained in it, such as a separate, incidental or collateral stipulation, non-performance of the latter will not, in equity, defeat recovery.[11] In several cases the rule is stated that where the contract is for a certain subject matter, and also for an unessential adjunct the contract can be enforced if the adjunct fails,[12] but if the adjunct is necessary and essential, as where the adjunct is the furniture and fixtures of a public house then the contract fails if the adjunct fails.[13] The same principle is expressed in the cases cited,[14] holding that if the failure in the performance of the contract is of a partial, immaterial, or formal part, not affecting the substance, it will not abrogate the contract, but if the non-performance is of a part, material and essential to the enjoyment of the remainder, then the failure of that part will abrogate the whole. This equity doctrine was quite clearly stated by Lord Redesdale in Davis v. Hone.[15] "A court of equity will decree specific performance * * * if it be conscientious that the agreement should be performed as in cases where the terms of the agreement have not been strictly performed, although to recover at law performance must be according to the very terms of the contract." And in Halsey v. Grant,[16] Lord Erskine said, "Equity does not permit the forms of law to be made instruments of injustice and will interpose against any person attempting to avail themselves of the rigid rule of law for unconscientious purposes. Where, therefore, advantage is taken of something which does not admit of strict performance, and if the failure is not substantial equity, will interfere," and if the contract is substantially performed that is sufficient.[17]

*Under the Code System.*—This law rule has been rejected and the equity rule adopted under the code system, and generally in the United States. The equity rule is more just and better adapted to administer human transactions and can be resorted to in all cases. If oppressive or unjust stipulations are being enforced at law, equity can intervene by means of an injunction; and if this jurisdiction is desired in the first instance the remedy of specific performance is applicable. In a recent case[18] the contract was to furnish material and perform work to the satisfaction and acceptance of an architect. The material (stone) to be of good quality, free from iron and all spots or discolorations, subject to the inspection of the architect, and the stone to be pointed after erection. These stipulations were not strictly complied with, and the quality of the stone was particularly excepted to. The court stated that "formerly there was no recovery on a contract like this unless it was strictly performed. This has been relaxed, and now where the builder acts in good faith there may be such recovery although there is not a literal performance. If there is substantial compliance there can be a recovery. This is a suit on a contract, not on a *quantum meruit*. There is no evidence of the value of the work or the material. There is evidence of damages sustained by failure to strictly comply with the agreement. The action on the contract is proper and the measure of recovery is the sum stipulated in the contract, less the damages sustained by a failure to strictly perform it. Evidence of the quality of the stone is conflicting. The agreement that the stone should be free from iron and all spots and discolorations must be construed with respect to the uses to which the material was to be put. Perhaps no lot

[10] See Pomeroy on Cont. sec. 326, Lord v. Stephens, *supra*.

[11] Pomeroy Cont. sec. 325; Gibson v. Goldsmith, 5 De G. M. & G. 757.

[12] Richardson v. Smith, L. R. 5 Ch. 648; Stewart v. Metcalf, 68 Ill. 109.

[13] Darby v. Whittaker, 4 Drew. 134; Jackson v. Jackson, 1 Sm. & Gif. 184.

[14] Shackleton v. Sutcliffe, 1 DeG. & Sm. 609; Perkins v. Ede, 16 Beav. 193; Howard v. Kimball, 65 N. C. 175; Griffin v. Cunningham, 19 Gratt. 571; Taylor v. Williams, 45 Mo. 80; Shaw v. Vincent, 64 N. C. 690; Smith v. Turner, 50 Ind. 367; Havens v. Bliss, 26 N. J. Eq. 363; Batsford v. Wilson, 75 Ill. 132; Hinkle v. Margerum, 50 Ind. 240; Gregory v. Perkins, 40 Iowa, 82; Davison v. Perrine, 7 C. E. Green 87; Walsh v. Barton, 24 O. St. 28; Holland v. Holmes, 14 Fla. 390; Page v. Greeley, 75 Ill. 400; Bogan v. Daughdrill, 51 Ala. 312.

[15] 2 Sch. & Lef. 347.

[16] 13 Ves. 77.

[17] Long v. Fletcher, 2 Eq. Ca. 4; Spanner v. Walsh 11 Ir. Eq. 597.

of stone of this kind is wholly free from iron and spots."[19]

In Phillips v. Gallant[20] the court said "where the contractor has in good faith intended to and has substantially complied with the contract, although there are slight defects caused by inadvertence or unintentional omissions, he may recover the contract price less the damage on account of the defects. There must not be any wilfull or intentional departure, and the defects must not pervade the whole, or be so essential as that the object which the parties intended to accomplish—to-wit—to have a specified amount of work performed in a particular manner—is not accomplished. This of course is a question of fact." This proposition had been previously asserted,[21] holding that a substantial compliance is sufficient, especially so in building contracts which generally embrace so many particulars, that it is difficult, if not impracticable to comply with entire exactness.

In Mehurin v. Stone[22] the contract was for a solid bed of stone, well cemented together for a foundation for a vault; and also for a marble slab for the space immediately below the roof. The foundation was not made as agreed and there were four pieces of marble instead of one. The court held that this was not a substantial compliance with the contract and said: "There was a very material deviation from the terms of the contract, and a deviation of such a character as to show a substantial non-compliance by the plaintiff with the stipulations of the contract." "No recovery can be had on a *quantum meruit*, because where the contract is express, none can be implied relating to the same subject matter. The principle that conditions precedent to the right to compensation for labor done or material furnished, must be substantially performed in order to put the other party in default is of universal application."

In Goldsmith v. Hand[23] the contract was to build a house according to plans and specifications. It was urged that the plaintiff could not recover unless the contract was fully performed according to its terms; the court held that as the proof showed that the parties deviated from the contract and the owner took possession, "thereby appropriating the fruits of the contract, he ought on the plainest principles of justice, to pay for them at the contract price, less such sums for delay, defective work, or inferior material, etc., as the owner is in equity entitled to have deducted." In this case, the recovery was in fact sustained on the ground that the work had been substantially performed. It could be inferred from the language used that a different rule is applicable to building contracts, but this is a mistake. The rule is applicable to all contracts.[24]

In Hayward v. Leonard[25] the contract was to perform work and furnish material in a certain manner. They were not performed in the manner stipulated, but were substantially performed. The court held that an action on a *quantum meruit* for the labor and a *quantum volebant* for the materials, for the contract price was maintainable deducting for any loss sustained by deviations from the contract. The same position is found in the Maine cases.[26] This is well explained in Almstead v. Beale[27] where the court said: "In cases of Hayward v. Leonard and Smith v. The First Congregational Meeting House[28] there was an express or implied assent to the deviation from the contract and a substantial performance. The principle (in all cases) is that unimportant, accidental, and unintentional deviations will not in equity prevent recovery. But if there is an important and voluntary deviation or omission from the contract there can be no recovery for the materials furnished or services performed.[29] A substantial performance is confined to cases in which there is an honest intention to go by the contract and a substantive execution of it although there are slight deviations as to some particulars. If substantial performance is shown, technical, inadvertent and unimportant omissions or defects will not defeat re-

[19] The same principle or proposition adopted in Cullin v. Bimm, 37 O. St. 236, Goldsmith v. Hand, 26 O. St. 101; Mehnrin v. Stone, 37 O. St. 49; Nolan v. Whitney, 88 N. Y. 648. See Whart. Cont. sec. 594.

[20] 62 N. Y. 264.

[21] Johnson v. DePeyster 60 N. Y. 666; Glacius v. Black, 50 N. Y. 145.

[22] 37 O. St. 49.
26 O. St. 101.

[24] Smith v. Brady, 17 N. Y. 173; Glacius v. Black, 50 N. Y. 145.

[25] 7 Pick. 181.

[26] Jewitt v. Weston, 11 Me. 346; White v. Oliver, 36 Me. 92.

[27] 19 Pick. 528.

[28] 8 Pick. 178.

[29] Citing Faxon v. Mansfield, 2 Mass. 147.

covery." Another case will only be necessary to show that the common law rule has been abandoned and the equity doctrine adopted. In Nolans v. Whitney,* the court stated: "It is a general rule of law that a party must perform his contract before he can claim the consideration due him upon the performance, but the performance need not in all cases be literal and exact. It is sufficient if the party bound to perform acting in good faith and intending and attempting to perform his contract does so substantially, and then he may recover for his work, notwithstanding slight or trivial defects in the performance for which compensation may be made by an allowance to the other party. Whether a contract has been substantially performed is a question of fact depending upon all the circumstances of the case to be determined by the trial court."[30]

*Examples of substantial performance.*—As a general proposition the non-performance of a material part of the contract will not amount to a substantial performance.[31] The vital question is was the non-performance material or immaterial,[32] although this is evolved from the cases which more immediately apply to vendor and purchaser, yet the doctrine is applicable to the whole field of contracts. It is a material failure and hence not a substantial performance if the vendor agrees to give a lease, but furnishes an underlease,[33] or furnish a lesser estate where the contract is for a fee simple.[34] But if the lesser estate be equal in value to the estate agreed upon and the latter being sure to fall in, it is a substantial performance unless the contract expressly stipulates that if any part fails the whole shall be void.[35] If the contract is for a fee simple subject to a perpetual rent charge the vendor cannot give a perpetual rent charge without the fee.[36] If the contract is for an estate in entirety, the vendor cannot give a tenancy in common,[37] nor an estate in remainder for one in possession,[38] nor an estate with rights of uses, for an unincumbered estate.[39] On the other hand, if the defect or variation from the agreement is obvious or if the vendee had notice, the contract can be enforced.[40] To illustrate King v. Bardeau, two lots were sold. It was found that the building on one lot projected 20 inches on the other lot. The vendee claimed that this prevented him from using the premises for the purpose for which they were purchased and sought a rescission of the contract; but Chancellor Kent held that the defect was patent, and that the contract was substantltialy performed, but for any positive injury an equitable abatement in the consideration would be allowed. The same principle substantially pervades the following case.[41]

In Foley v. Crow,[42] the court said "where the vendor is unable from any cause not involving *mala fides*, to convey each and every parcel of the land contracted to be sold, and it is apparent that the part that cannot be conveyed is of small importance, or is immaterial to the purchaser's enjoyment of that which may be conveyed to him, in such case the vendor may insist on performance" and

* 88 N. Y. 548.

30 Citing Smith v. Brady, 17 N. Y. 189; Thomas v. Fleury, 26 N. Y. 26; Glacius v. Black, 50 N. Y. 145; Johnson v. Depey, 50 N. Y. 666; Phillips v. Gallant, 62 N. Y. 256; National Bank v. The Mayor, 63 N. Y. 336.

31 King v. Knapp, 59 N. Y. 462; Hoover v. Calhoun, 16 Gratt. 109; Jackson v. Signon, 3 Leigh 161; McKean v. Read, 6 Litt. 395; Bryan v. Read, 1 Dev. and Bat. Ch. 78; Reed v. Noe, 9 Yerg. 283; Cunningham v. Sharp, 11 Humph 116; Buchanan v. Alwell, 8 Humph. 516; Hepburn v. Auld, 5 Cranch, 262; Vreeland v. Blanvelt, 23 N. J. Eq. 483; Dabbs v. Norcross, 24 N. J. Eq. 327; Jeffries v. Jeffries, 117 Mass. 184.

32 McQueen v. Farguhar, 11 Ves. 467; Knatchbull v. Grueber, 1 Mad. 153; Bowyer v. Bright, 13 Price, 698; Carver v. Richards, 6 Jur. N. S. 667; Stoddart v. Smith, 5 Binney 355; Foley v. Crow, 37 Md. 51.

33 Madeley v. Booth, 2 DeG. & Sm. 718; Darlington v. Hamilton, Kay 558.

34 Drewe v. Carp, 9 Ves. 368; Wright v. Howard, 1 S. & S. 190; Barton v. Lord Downes, 1 Flan. & K. 505.

35 Twining v. Maurice, 2 Bro. C. C. 263; Price v. MaCauley, 2 DeG. M. & G. 349; Ayles v. Cox, 16 Beav. 23; Daniels v. Dairson, 16 Ves. 249.

36 Pendergast v. Eyre, 2 Hogan, 81.

37 Att'y Gen'l v. Day, 1 Ves. Sr. 218; Raffey v. Shallcross, 4 Madd. 227; Dalley v. Pullen, 3 Sim. 29; Casamajor v. Strode, 2 My. & K. 726; Erwin v. Myers, 10 Wright 96; Napier v. Darlington, 20 P. F. Smith, 64; Clark v. Reins, 12 Gratt. 98.

38 Collier v. Jenkins, Younge 295; Nelthrope v. Holgate, 1 Call. 203.

39 Seaman v. Vawdrey, 16 Ves. 290; Upperton v. Nicholson, L. R. 6 Ch. 436; Harnblow v. Shirley, 13 Ves. 81; Schaffer v. Pruden, 64 N. Y. 47.

40 Dyer v. Hargrave, 10 Ves. 505; Oldfield v. Roan, 5 Ves. 508; King v. Bardeau, 5 Johns. Ch. 38; Clark v. Seirer, 7 Watts, 107.

41 James v. Litchfield, L. R. 9 Eq. 51; Cabello v. Hentz, L. R. 9 Ch. 447; Smoot v. Rea, 19 Md. 398; Smith v. Crandall, 20 Md. 482; Laverty v. Moore, 33 N. Y. 658; Hunter v. Bales, 24 Ind. 290; Dean v. Comstock, 32 Ill. 173.

42 37 Md. 51.

when proper "with compensation to the purchaser, or a proportionate abatement from the agreed price if that has not been paid." The same proposition is illustrated in the following cases.[43]

*Conclusion.*—The conclusion therefore follows that the equity rule is firmly established, that by this doctrine substantial performance of a contract is sufficient; and that under the code system and generally in the United States, this equity rule is adopted.

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[43] Shirley v. Davis, 6 Ves. 678; Stewart v. Conyngham, 1 Ir. Ch. 534; Shaw v. Vincent, 64 N. C. 690; Davison v. Perrine, 7 C. E. Green 87.

## IMPLIED GRANT AND IMPLIED RESERVATION.

The case of Russell v. Watts,[1] as it presents itself to the non-legal mind, would almost seem to be the *reductio ad absurdum* of the doctrine laid down in Wheeldon v. Burrows.[2] The material facts were simple. J., a linen draper, commenced the erection of a high building for the purposes of a shop. As originally planned, the interior of the building was intended to be lighted by a glass dome extending over the whole, but this plan was abandoned, and the building was so constructed that it was capable of being divided into several blocks, A., B., C., &c., which were, however, partly dependent on each other for light, and for access from one floor to another. While the building was in course of erection, J. mortgaged block C. to the predecessors in title of the defendants, who had notice of the general scheme of construction. He subsequently mortgaged block B. to the predecessors in title of the plaintiff. Before the commencement of the action the several blocks had been converted into separate tenements. Many of the rooms in block B. chiefly depended for their light upon block C. The defendants had blocked the plaintiff's windows which looked over their premises, and rendered the rooms so darkened useless for living purposes. Under these circumstances, Vice-Chancellor Bacon granted an injunction. But the Court of Appeal, Lord Justice Lindley dissenting, reversed the decision of the Vice-Chancellor, and held that there was no reservation of light to block B. from block C. Though this decision left the defendants victorious, the opinions for and against them were equally divided. The broad legal question for the consideration of the court was one which had exercised the minds of judges from the earliest times--viz., whether an implied reservation on a sale did or did not stand upon the same footing as an implied grant. The court were unanimous in deciding this question in the negative, and, in fact, no other decision was open to them after Lord Justice Thesiger's elaborate exposition of the law in Wheeldon v. Burrows. It only remained to consider whether the circumstances of Russell v. Watts were such as to exempt it it from the general rule of law

The law was thus stated by Lord Justice Thesiger:—"On the grant by the owner of a tenement of part of that tenement as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements (by which, of course, I mean *quasi*-easements) or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been, and are at the time of the grant, used by the owner of the entirety for the benefit of the part granted. If the grantor intends to reserve any right over the tenement granted, it is his duty to reserve it expressly in the grant." It follows from this view of the law (1) that, if a man has a house and a piece of land adjoining, and sells the house, he may not obstruct the lights of the house; if he sells the land, the purchaser may. (2) If a man has two houses adjoining, and sells one, the purchaser may obstruct the lights of the vendor, but the vendor may not obstruct the lights of the purchaser; and the same observations apply where the owner of a house sells a part of it. Of course, if the vendor afterwards sells the rest of the severed property, the subsequent purchaser can be in no better position than his vendor. If a man has two pieces of land not built upon adjoining each other, and sells one, and the purchaser builds upon it, it has never been

[1] 32 W. R. 621, L. R. 25 Ch. D. 559.
[2] 28 W. R. 196, L. R. 12 Ch. D. 31.

suggested that the vendor may not obstruct the lights of the purchaser, and it is at least doubtful whether there can be an easement of light over land without buildings.

The principle of Wheeldon v. Burrows, involves this curious anomaly, that a grant may be implied of rights which no sane man would ever dream of granting in express terms. It may seem impertinent to question the soundness of a principle which has been approved by two Lord Chancellors, and has been twice adopted with the greatest deliberation by the Court of Appeal, but it appears to the lay mind so curiously incomprehensible; it has been the subject of so many conflicting decisions, and has been so strenuously opposed by text-writers of authority, that we need no further apology for not allowing the matter to rest until it is finally settled by the House of Lords.

The principle is always alleged to be founded upon the well-known maxim that no man may derogate from his grant. But to educe from that maxim the principle that everything that is not expressly granted is granted by implication, and that nothing which is not expressly reserved is reserved by implication, is surely begging the question what is included in a grant. The argument appears to come to this, that because a man may not derogate from his grant, therefore he must be presumed to have granted everything which he has not granted. The opposite contention is that, where property is severed, all continuous and apparent easements which are necessary to the reasonable enjoyment of either part of the property, as it was at the time of the conveyance, must be presumed to be granted or reserved as the case may be. This is no new contention. It was accepted in Nicholas v. Chamberlain,[3] in the reign of James I., though subsequently in Tenant v. Goldwin,[4] the court arrived at a contrary conclusion, while in Palmer v. Fletcher,[5] the judges were unable to agree. In later times it has been supported by the cases of Pyer v. Carter,[6] and Richards v. Rose,[7] though they are outnumbered by the cases on the other side. We venture, however, to submit that, notwithstanding the weight of authority against it, it is the only reasonable and sensible view of the law, as it is unquestionably the only view which adapts itself to all cases.

It was expressly stated by Lord Justice Thesiger in Wheeldon v. Burrows that the decision in Pyer v. Carter went upon the principle that there was no distinction between implied reservation and implied grant. That case was declared by Lord Justice Mellish to be "good sense and good law," We must however, admit that so long as Wheeldon v. Burrows and Russell v. Watts remain unimpeached, the latter part of the *dictum*, at any rate, no longer holds good. Pyer v. Carter had been preceded by Richards v. Rose, which was a case of mutual support between two adjoining houses. It was there held that the question of priority of title was immaterial, and it was stated by Baron Park in the course of the argument that neither party would have been entitled to obstruct the lights of the other. It is quite possible that the court in Richards v. Rose only intended to apply the principle for which we contend where, from the nature of the severed property, the different parts were mutually interdependent for necessary easements. It is true that there is nothing in the language of the judgment to warrant this restricted construction; but in White v. Bass[8] where there was no question of mutual easements, Lord Chief Baron Pollock[9] decided in opposition to Pyer v. Carter. The circumstances of Pyer v. Carter are also not inconsistent with this narrower view, though the judgment is. The same view was apparently entertained by Lord Justice Cotton in Russell v. Watts, as he expressly exempts the case of mutual easements from the operation of the general rule laid down in Wheeldon v. Burrows. But whatever may be the precise effect of Richards v. Rose, that decision was based upon the palpable absurdity of allowing the first vendee of one of a row of houses to withdraw his support from his neighbor's houses and reduce them to a mass of ruins.

It can not be denied that, taking the general rule of law to be as stated in Wheeldon v. Burrows and Russell v. Watts, it is subject to

3 Cro. Jac. 121.
4 6 Mod. 314.
5 1 Lev. 122.
6 5 W. R. 871, 1 H. & N. 916.
7 9 Ex. 218.
8 7 H. & N. 722.
9 The same judge who delivered the judgment of the court in Richards v. Rose.

very wide exceptions. Lord Justice Cotton mentions two—(1) where there is a mutual easement; (2) where there is an easement of necessity, as a way. But he seems to admit that there might be an easement of necessity as to light, though in his lordship's opinion, the kind of necessity which would warrant an implied reservation must be something much more stringent than that from which the court would imply a grant. In Russell v. Watts the plaintiff's rooms were rendered practically uninhabitable by the loss of light, yet that was not a sufficient necessity. A third exception—that of contemporaneous conveyances—was held by Lord Justice Cotton to be no exception at all, on the the ground that each of the grantees was looked upon as taking from the grantor, while he had still the power to give it, what he was entitled to get; but we believe this ingenious method of accounting for the law on contemporaneous conveyances to be of recent origin. Lord Justice Fry declined to decide whether light could be regarded as an easement of necessity, and Lord Justice Thesiger, in Wheeldon v. Burrows, doubted whether such an easement was not confined to ways. Lord Justice Lindley accepted Wheeldon v. Burrows without comment; but considered that there was, throughout the whole transaction, a degree of mutuality in the relations between the parties which rendered it inequitable for any one party to insist upon rights inconsistent with the general scheme of building. We do not despair that the question may yet be settled by the House of Lords on what we have endeavored to prove is the only sound basis. In the mean time, we can but bow to authority, in the hope that we may some day learn to appreciate the reason of the rule that there is all the difference in the world between an implied grant and an implied reservation.—*Solicitor's Journal.*

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MUNICIPAL BONDS — AMENDMENT OF CHARTER — LIABILITY OF SUCCESSOR CORPORATION.

LAIRD v. CITY OF DE SOTO.

*United States Circuit Court, E. D. Missouri.*

**A municipality can not escape liability for its bonds by changes in charter or organization, and the fact that one of the various corporations was declared by *quo warranto* proceedings to be void, does not relieve the present corporation comprising the same territory and people, from their obligation to pay the bonds as successor of the corporation which issued the bonds.**

Before MILLER, Justice, and TREAT, J.

*Mills & Flitcraft* for plaintiff; *Jos. J. Williams* for defendant.

MILLER, Justice, delivered the opinion of the court:

This case was submitted to the court without a jury, on the petition and amended answer.

The defense relied on is, that when the bonds were issued by the trustees of the town of De Soto, no such corporation was in existence. The plea set out that in August, 1872, such steps were taken that the county court of Jefferson county made an order declaring a certain boundary of land and its people, a corporation by the name and style of the inhabitants of the town of De Soto, and appointing trustees for its government. On the first day of October, 1872, these trustees issued the bonds to which were attached the coupons now sued on.

The plea, after stating these facts, proceeds to aver that afterwards, in the year 1877, the residents of the town took proceedings to have it declared a city of the fourth class, and the court made the necessary order to that effect. After this city government with the mayor and aldermen had continued for five years, in 1882 some of the citizens instituted in the proper State court, a proceeding by *quo warranto* in which the court decreed, as the answer alleges, that the city of De Soto no longer existed.

This decree is set up as an absolute defense and bar to the plaintiffs recovery, as showing there was never any corporate authority to issue these bonds.

But it does not show this:

1. Because the decree disolving the city organization has no tendency to show that the town of De Soto, which was organized and issued its bonds ten years before, was not a valid organization.

2. Because these bond holders were no party to that proceeding.

3. Because, if the city organization of 1877 was absolutely void, the town of De Soto remained, and the city orginization now sued, which was created by order of the county court after the dissolution of the first city organization by the decree in *quo warranto*, is the legitimate successor of the town of De Soto which issued the bonds, being composed of the same territory and the same people, and is only a change in the name of the corporation and in its mode of government. Broughton v. Pensacola, 93 U. S. Rep. 266.

As this was the only defense made by the plea, the motion for a new trial was overruled, and judgment is to be entered for the plaintiff.

JUDICIAL SALES—DEBTOR AND CREDITOR—MORTGAGE—BOND—MARRIED WOMEN.

WELLS v. VANDYKE.

*Supreme Court of Pennsylvania, April 14, 1884.*

One who sells land on bond, with warrant of attorney to confess judgment, and the judgment entered and execution thereon, and bids a certain sum therefor, is bound to credit the sum so bid on a mortgage given to him on the same land, although the bond was void and the sale conferred no title.

Error to the Common Pleas of Bradford County.

*Scire facias* sur mortgage, by G. H. Vandyke against Charles Wells and Amelia Wells, his wife.

The facts of this case were as follows: Amelia Wells, being seized in fee of some real estate, joined with her husband in a bond with a warrant of attorney and mortgage on the said premises to G. H. Vandyke, to secure the payment of $5757.28. Vandyke entered up judgment on the bond, and, issuing execution thereon, levied on the said real estate, and bought it in at sheriff's sale for $4,000. Other creditors of Chas. Wells, the husband, claiming the money, an Auditor was appointed to distribute the fund, who awarded it to Vandyke, and his report was confirmed. An appeal was taken to the Supreme Court, and the decree of the court below affirmed. Subsequently Vandyke issued this *sci. fa.* on the mortgage. The defendants put in an affidavit of defense, setting up the the facts stated above. Judgment was entered for the defendants in the court below, but upon writ of error this judgment was reversed, and a procedendo awarded. See the report of the case, *sub nom.* Vandyke v. Wells, in 13 W. N. C. 341, where the facts are fully set out.

Subsequently, on the trial before MORROW, P. J., the defendants claimed credit for the sum bid by Vandyke, less costs, to-wit, the sum of $3924.60. The court charged the jury *inter alia*, as follows:

"It is true a bond and mortgage are two securities for the same debt, and payment of one is payment of both; but when the bond is void, and the alleged payment is not in money, or other valuable thing, I am inclined to hold it is no payment on the mortgage. You are, therefore, directed to find for the plaintiff the full sum covered by the mortgage."

Verdict accordingly for the plaintiff for $6863.67, and judgment thereon. Whereupon the defendants took this writ, assigning for error, *inter alia*, the portion of the charge above cited.

*H. N. Williams*, *Rodney A. Mercur* and *E. J. Angle*, for plaintiffs in error; *John F. Sanderson* and *Edward Overton, Jr.*, for defendant in error.

PAXON, J., delivered the opinion of the court:

This case was here before upon the refusal of the court below to enter judgment for want of a sufficient affidavit of defense. We then held (see 13 Weekly Notes, 341) that the sale under an execution issued upon the bond accompanying the mortgage, was void as against Mrs. Wells, she being a married woman, and that the sale did not pass her title to the mortgaged premises. It followed that said sale was no defence to the *scire facias* on the mortgage, the judgment was therefore reversed. and a procedendo awarded.

Since then the case has been tried in the court below, and it now comes up on the verdict against the defendant for the full amount of the mortgage. Upon the trial the defendants claimed as a credit the amount of the plaintiff's bid ($4,000) upon the first sheriff's sale, which was objected to by the plaintiff, and disallowed by the court.

It requires but a moment's reflection to see that the credit should have been allowed. That sale was confirmed; the plaintiff claimed a credit for his bid; this was referred to an Auditor, and the claim was allowed by the Auditor and the court below. The matter was, therefore, solemnly adjudged by a court of competent jurisdiction, and the decree can not be attacked collaterally and disposed of in this summary manner.

It is no answer to say that the plaintiff bought a worthless title, that is begging the question. The execution issued upon the bond was a valid execution against the husband, and the sale thereunder passed any title there may have been in him. It may be he had no interest in the property; we do not know, and therefore can not say so. The plaintiff may have supposed he had an interest, and he had a right to sell it in the way he did. And, though the fact be that he had no interest whatever, it does not help the plaintiff in this proceeding. A man who buys a worthless title at a sheriff's sale and pays for it, or is allowed a credit on his lien, which is substantially the same thing, has no standing to repudiate the transaction subsequently. The facts now set up by the plaintiff might have afforded a ground of relief had an application been made to the court below at a proper time, and in a proper manner. But he allowed the sale to be confirmed, and insisted upon being allowed a credit for his bid.

The rule in sheriff's sale is *caveat emptor*. The parties do not treat for a title, but the creditor proposes to sell and the purchaser to buy just whatever interest the debtor may have in the land. Weidler v. Bank, 11 S. & R. 134.

We are of opinion that the amount the property sold for at the first sale should be credited upon the mortgage.

Judgment reversed, and a *venire facias de novo* awarded.

CONTRACTS BETWEEN HUSBAND AND WIFE IN BAR OF DOWER.

WHITNEY v. CLOSSON.

*Supreme Judicial Court of Massachusetts. November, 1884.*

Though the laws of a state confer upon married

**women the freedom of contract possessed by *femes sole*, an agreement between husband and wife upon valuable consideration by which each agrees to make no claim upon the estate of the other in case of death, is not binding and no bar to a petition by a wife for her statutory share in her late husband's estate.**

This was a petition by the appellant under Public Statutes Ch. 124. sec. 3, to have real estate to the amount of $5,000, set off to her, out of her husband's estate. At the hearing before the judge of probate it appeared that the petitioner and her husband sometime previous to his death drew up agreements in which it was mutually stipulated and agreed that they should not make any claim on each other's estates, and the petitioner in consideration of $1,000 further covenanted for herself, her executor and assignee that she would sign deeds and mortgages in release of dower in her husband's estate and never ask or or try to obtain any part of his property, real or personal or to make any claim for dower or homestead in the same. After signing this agreement they separated, and the husband died intestate without issue. To provide for the payment of the $1,000 it appeared that the husband mortgaged his estate to one Henry S. Sheldon, in which the petitioner joined and gave five notes for $200 each; that two of these notes only were paid by the husband in his lifetime; and that no part of the $1,000 was ever received by the petitioner.

The probate court refused to grant the petition and the wife appealed.

*David Hill*, for petitioner; *S. O. Lamb*, for respondents.

MORTON, C. J., delivered the opinirn of the court:

This is a petition of the widow of Lyman H. Whitney, deceased, intestate and without issue praying that said estate of the deceased to an amount not exceeding five thousand dollars in value may be assigned to her under chapter 124 of the Public Statute.

It is conceded that her petition should be barred of any rights by the agreement between herself and husband of which a copy is annexed to the report.

By the common law, husband and wife can not contract with each other. This disability is not removed by our statutes, which, while enlarging the capacity and rights of married women in important respects, expressly provides that they shall not authorize suits between husband and wife. St. 1874, ch. 184; Pub. St., ch. 147, sec. 207. The contract on which the respondents rely is a contract directly between the husband and wife without the intervention of a trustee and is partly executory in character. Neither of the parties could during their lives enforce the contract against the other, not merely because of the disability to sue, but for the reason that the contract itself is contrary to law and is void. It appeared at the hearing that the husband on the same day the agreement was signed gave to one Sheldon five notes two hundred dollars each, and to secure them, executed a mortgage of real estate to said Sheldon, and that said notes were intended to be for the sum of one thousand dollars mentioned in the agreement.

Two of the notes were paid during his life-time but no part of the money has come to the petitioner. But this does not make Sheldon a party to the contract or remove the difficulty that the contract between husband and wife was void. The giving the notes and mortgages was the mode adopted of paying the sum named in the contract and has no more effect than as if the money had been paid to the wife or to Sheldon for her use.

The transaction can not be treated as a pecuniary provision for her which has the effect of buying her dower. There is no instrument settling one thousand dollars as a pecuniary provision for her in lieu of dower signed or attested to by her. It was not the intention of the parties that the sum paid to Sheldon should by itself be a provision in lieu of dower,

The petitioner undertook to agree with her husband that she would waive all claims upon his estate not merely in consideration of one thousand dollars, but also in consideration of his covenants and stipulations that he would waive all claims upon her property, which covenants and stipulations are void and of no effect.

Besides if the transaction could be treated as a pecuniary provision in lieu of dower she would have the right to waive it at any time within six months after her husband's death and to claim her dower and other rights in his estate and it is at least questionable whether her petition to have his real estate assigned to her which was filed within six months of his death would not be held to be an election to waive the provision. We are of the opinion that upon the facts in this case the petitioner is not barred of her right to the real estate of her husband to an amount not exceeding $5,000 in value.

Decree of the Probate Court reversed.

## ANTENUPTIAL SETTLEMENT OR AGREEMENT AS A BAR TO DOWER.

By the common law no provision or settlement made by a man before his marriage in favor of his future wife, could bar dower,[1] because dower being a freehold estate, by a maxim of the common law, could not be barred by a collateral satisfaction;[2] but the Statute of Uses provided that a settlement of a certain kind, a legal jointure, made before marriage should bar dower,[3] even without the wife's consent;[4] this statute was adopted in the United States as a part of the common law,[5] and somewhat similar statutes have

1 Vincent v. Spooner, 2 Cush. 467, 473.

2 Hastings v. Dickinson, 7 Mass. 153, 155; S. P. Vernon, 4 Rep. 1, 4; O'Brien v. Elliott, 15 Me. 125, 127; Logan v. Phillips, 18 Mo. 22, 25; Jones v. Powell, 6 Johns. Ch. 196, 200; Murphy, 12 Ohio St. 407, 459.

3 Co. Litt. 36*b*: Vernon, 4 Rep. 1, 3*a*; 27 Henry VIII, ch. 10, sec. 9.

4 1 Greenl. Cruise. 199, sec. 37; 1 Wash. R. P. p. 263; 2 Scrib. Dower. 455; *post*, sec. 273.

5 Alex. Brit. Stat. in force, pp. 301, 302.

been passed in many of the United States.[6] By the common law, also, no contract between the husband and wife before marriage could bar dower,[7] because, first, an agreement was merged by the marriage of the contracting parties,[8] and second, an agreement to release a right not yet existing was void.[9] And even now, except under the express provisions of some statute, no settlement or agreement between husband and wife before marriage, is a bar to dower at law.[10] But equity, from analogy to the statute of Uses, at an early date compelled a widow to elect between her dower and any provision made for her before marriage expressly in lieu of dower, and held her barred of her dower by the acceptance of any such provision.[11] And in courts of equity a marriage contract was held an exception to the rule that the marriage of the contracting parties merges the contract,[12] and a wife's covenant not to claim dower, marriage itself being a sufficient consideration therefor,[13] has always been enforced.[14] Of an adult woman's power in equity to absolutely bar herself of dower, there is no doubt whatever, says Lord St. Leonards;[15] if she acts with her eyes open she may take even a chance in lieu of dower;[16] she is *sui juris*, and there is no reason why her covenant should not be enforced;[17] and so it is settled that, by an agreement before marriage, husband and wife may vary or wholly waive their rights in each other's property.[18] Still, if it is stipulated that the wife shall receive a certain provision in lieu of her dower, and this stipulation is not carried out, she is released from her contract;[19] but if she accepts some other provision after her husband's death, in lieu of the one which has failed, she is barred.[20] An antenuptial contract is of course invalidated by fraud, and a husband is required to be particularly open in making such a contract with his wife.[21] A contract expressly referring to dower, has no effect on the wife's thirds.[22]

6 See Ark. Dig. 1874, secs. 2218, 2220; Ill. R. S. 1880, p. 426, secs. 7, 11; Mo. R. S. 1879, sec. 2202.

7 Gibson, 15 Mass. 106, 110; Logan v. Phillips, 18 Mo. 22, 25; Murphy, 12 Ohio St. 407, 409, 416.

8 See Long v. Kinney, 49 Ind, 235, 238; Smiley, 18 Ohio St. 543, 544; *ante*, sec. 44.

9 Hastings v. Dickinson, 7 Mass. 153, 155; Logan v. Phillips, 18 Mo. 22, 25; Murphy, 12 Ohio St. 407, 409, 416.

10 Martin, 22 Ala. 86, 104; Andrews, 8 Conn. 79, 84; Conley v. Lawson, 5 Jones Eq. 132, 134; Murphy v. Avery, 1 Dev. & B. 25; Murphy, 12 Ohio St. 407, 411, 417; Gelzer, 1 Bail. Ex. 387, 388.

11 Logan v. Phillips, 18 Mo. 22, 26; S. P. Andrews, 8 Conn. 79, 85; McGee, 91 Ill. 548, 551; Jordan v. Clark, 81 Ill. 465, 466; Hastings v. Dickinson, 7 Mass. 153, 155.

12 Miller v. Goodwin, 8 Gray, 512, 544; Crane v. Gough, 4 Md. 311, 331; McCampbell, 2 Lea, 661, 664.

13 Wentworth, 69 Me. 247, 253; Stewart, M. & D. sec. 33.

14 Dyke v. Reedall, 2 De Gex, M. & G. 209, 216, 218, 219; Andrews, 8 Conn. 79, 84; Culbertson, 37 Ga. 296, 299; McGee, 91 Ill. 548, 551: Jordan v. Clark, 81 Ill. 465, 466; Wentworth, 69 Me. 247, 252; Naill v. Maurer, 25 Md. 532, 539; Bresey v. McCurley, 61 Md. 436, 443; Freeland, 128 Mass. 509, 510; Jenkins v. Holt, 109 Mass. 281; Miller v. Goodwin, 8 Gray, 542, 544; Vincent v. Spooner, 2 Cush. 467, 473; Logan v. Phillips, 18 Mo. 22, 28; Heald, 22 N. H. 265; Camden v. Jones, 23 N. J. Ex. 171, 173; Cauley v. Lawson, 5 Jones Ex. 132, 134; Murphy, 12 Ohio St. 407, 417; Bowen, 32 Ohio St. 164, 180; Mintier, 28 Ohio St. 307, 312, 315; Gelzer, 1 Bail. Ex. 387, 388; Findly, 11 Gratt. 434, 437; Charles, 8 Gratt. 486; Faulkner, 3 Leigh. 255, Stewart, M. & D. secs. 32, 43.

15 Dyke v. Reedal 2 De Gex, M. & G. 209, 216; 13 Eng. L. & Eq. 454.

16 Caruthers, 4 Bro. C. C. 500; Dyke v. Rendall, De Gex, M. & G. 209, 218.

17 Logan v. Phillips, 18 Mo. 22, 28.

18 Wentworth, 79 Me. 247, 252; Naill v. Maurer, 25 Md. 532, 539; Findley, 11 Gratt. 434, 437; Stewart, M. & D. secs. 32, 43.

19 Freeland, 128 Mass. 507, 511; Gibson, 15 Mass. 106, 112; Camden v. Jones, 23 N. J. Ex. 171, 173.

20 Camden v. Jones, 23 N. J. Ex. 171, 173; *post*, sec. 276.

21 Freeland, 128 Mass. 509, 510; Breier, 92 Pa. St. 265; Stewart, M. & D. sec. 38.

22 Findley, 11 Gratt. 434, 438.

## POST-NUPTIAL SETTLEMENT OR AGREEMENT AS A BAR TO DOWER.

Any agreement between husband and wife was at common law void,[1] because husband and wife were one,[2] and because a wife could not contract at all;[3] and though the fiction of the unity of husband never had a footing in equity,[4] and has been much modified by modern statutes at law,[5] and therefore a wife can by a contract with reference to her statutory[6] or equitable[7] estate bind such estate at all events in equity, her capacity to contract generally must be expressly given,[8] and as dower is neither equitable[9] nor statutory[10] separate estate, but a right *sui generis*, arising by operation of law,[11] she can make no contract with reference to it except under the provisions of a statute giving her the power to contract in all cases or expressly referring to it.[12] Statutes have been passed, in all those States where a husband can not defeat dower by his separate deed,[13] authorizing married women to release their dower in a prescribed way;[14] these statutes must be strictly complied with,[15] and a release not valid at law is not valid in equity,[16]—equity will not even correct a deed as to the wife,[17] and certainly will not enforce a defective release as a contract to convey.[18] When the question arises as to the validity of a release to the husband under one of these statutes which authorizes releases generally, it must be remembered that in dealing with her husband a wife is said to be under a double incapacity, that of wife and that of married woman,[19] and that it is fairly settled that under a statute authorizing a married woman to contract generally, she can not contract

1 Barron, 24 Vt. 375, 398.

2 Scarborough v. Watkins, 9 Mon. B. 540, 545.

3 White v. Wager, 25 N. Y. 328, 332, 333.

4 Morrison v. Thistle, 67 Mo. 596, 600; Albin v. Lord, 39 N. H. 196, 204; *ante* sec. 42.

5 Cole v. Van Riper, 44 Ill. 56, 63.

6 See Wicks v. Mitchell, 9 Kan. 80, 87; Radford v. Carwile, 13 W. Va. 573, 661; Kronskop v. Shontz, 51 Wis. 204, 214.

7 Yale v. Dederer, 22 N. Y. 451, 459, 68 N. Y. 329.

8 Albin v. Lord, 39 N. H. 196, 202; Ballin v. Dillage, 37 N Y. 35, 37.

9 Because such estate is always created by contract, Morrison v. Ristle, 67 Mo. 596, 599.

10 McCormick v. Hunter, 58 Ind. 186, 188; Ulp v. Campbell, 19 Pa. St. 361, 363; Townsend v. Brown, 16 S. C. 91.

11 Martin, 22 Ala. 86, 105.

12 Martin, 22 Ala. 86, 105, S. P. Stidham v. Matthews, 29 Ark. 650 657, 658; Davis v. McDonald, 43 Ga. 205, 207; Lathrop v. Foster, 51 Me. 367, 369; Davis, 61 Mo. 395, 399; Grove v. Todd, 41 Md. 633, 639; Keeler v. Tatsell, 23 N. J. L. 62; White 16 N. J. L. 202, 214; Conover v. Porter, 14 Ohio St. 450, 454.

13 See 1 Scriber. Dow. chap. xxix.

14 These statutes differ greatly.

15 Grove v. Todd, 41 Md. 633, 639, *supra*. n. 12.

16 Stidham v. Mathews, 29 Ark. 650, 657, 658.

17 Wiswall v. Hall, 3 Paige, 313, 317; Carr v. Williams, 10 Ohio 305, 310; Davenport v. Sovil, 6 Ohio St. 459, 466.

18 Stidham v. Matthews, 29 Ark. 650, 658; Atwater v. Buckingham, 5 Day, 492, 497.

19 White v. Wager, 25 N. Y. 328, 332-334.

with her husband;[20] accordingly it has been held, that a release of dower under a statute directly to the husband is void,[21]—especially where the statute requires her to join with her husband; and that, as in the above case, even when she is authorized to contract any agreement between them for the release of dower is void.[22] And this is true though the release was commanded by a court of equity.[24] A contrary decision in Iowa stands by itself.[25] But, granting the capacity of husband and wife to contract with each other during coverture, there seems to be nothing in the nature of dower to except it from the rule that to avoid circuity of action, existing right may be equitably barred by an agreement never to claim it;[26] such a covenant should be enforced just as an ante-nuptial covenant is.[27] Under the statute of uses, a settlement made on a married woman during coverture in lieu of dower puts her to an election,[28] and it is settled in equity that a widow can not take both a provision in lieu of dower and dower itself,[29] (this is true as to devises in lieu of dower nearly everywhere by statute.[30]) So that, while, by a mere settlement on his wife not expressly in lieu of dower, or clearly inconsistent therewith, a husband does not affect her right to dower at all,[31] if by agreement with him, she accepts a provision in lieu of dower and after his death retains or receives it, she ratifies her contract and is barred.[32] But if she has spent or wasted the provision before his death, she may have her dower without making any return;[33] it is necessary in order to estop her, that she should enjoy the consideration of her agreement in part at least after his death.[34] This question has arisen several times in regard to deeds of separation.[35]

DAVID STEWART.

Baltimore, Md.

[20] Haker v. Boggs, 63 Ill. 161, 163; Whitney v. Closson, Mass. Nov. 1884, 1 Daily L. Record, No. 31; Knowles v. Neil, 99 Mass. 562, 564, 565; Lord v. Parker, 3 Allen, 127, 129; Aultman v. Obermeyer, 6 Neb. 260, 264; Savage v. O'Hull, 42 Barb. 374, 379; White v. Wager, 25 N. Y. 328, 330-334. *Contra*, Bank v. Banks, 107 U. S. 240, 244, 245; Kinkead, 3 Biss. 405, 410; Wells v. Gaywood, 3 El. 487, 494; Hamilton, 89 Ill. 349, 357; Robertson, 25 Iowa, 350, 355; Allen v. Hooper, 50 Me. 371, 374, 375; Vane v. Marble, 37 Mich. 319, 321, 323; Banson, 30 Mich. 328, 330; Rankin v. West, 25 Mich. 195, 200; Burdeno v. Emperse, 14 Mich. 91, 97; Albin v. Lord, 39 N. H. 196, 203, 204; Zimmerman v. Erhard, 58 How. Pr. 11, 13; Woodworth v. Sweet, 51 N. Y. 81; *ante* § 43.

[21] Rowe v. Hamilton, 3 Me. 63, 67; Carson v. Murray, 3 Paige, 483, 503; Crain v. Carana, 30 Bar. 410, 412, 413; Graham v. Van Wyck, 14 Barb. 531, 532, *infra*, § 22.

[22] Markling, 30 Ark. 17, 24; Pillow v. Wade, 31 Ark. 678, 681; Rowe v. Hamilton, 3 Me. 63, 65; Carson v. Murray 3 Paige, 483,503; Mallory v. Horan, 12 Abb. Pr. N. S. 289,295.

[23] Whitney v. Closson, S. J. C. Mass. Nov. 8, 1884; 1 Daily L. Rec. No. 31; see Martin, 22 Ala. 86, 104; Pillow v. Wade, 31 Ark. 678, 681; Markling, 30 Ark. 17, 24; Rowe v. Hamilton, 3 Me. 63, 67; Shaw v. Reese, 14 Me. 432, 436; Graham v. Van Wyck, 14 Barb. 531, 532; Crain v. Carana, 36 Barb. 410, 412; Townsend, 2 Sandf. 711, 713, 714; Mallory v. Horan, 12 Abb. Pr. N. S. 289, 295; Carson v. Murray, 3 Paige, 483,503; Walsh v. Kelly, 34 Pa. St. 84, 85; Evans, 3 Yeates, 507, 508.

[24] Crain v. Carana, 36 Barb. 410, 413.

[25] Blake, 7 Iowa, 46, 54; see Lake v. Gray, 30 Iowa, 415, 419.

[26] Hastings v. Dickinson, 7 Mass. 153, 155.

[27] *Supra.*

[28] 27 Henry viii, ch. 10, § 9; Co. Litt. 36 b.

[29] Jones v. Powell, 6 Johns. Ch. 194, 200; *post.* §§ 273-276.

[30] Jennings, 21 Ohio St. 56, 76.

[31] Mitchell, 8 Ala. 414, 424; Mitchell v. Wood, 60 Ga. 525, 531; O'Brien v. Elliott, 15 Me. 125, 127; Swain v. Petrie, 5 Johns. Ch. 482, 490.

[32] Martin, 22 Ala. 86, 104; Lively v. Paschal, 35 Ga. 218, 223; Stoddard v. Cutcompt, 41 Iowa, 329, 333; Day v. West, 2 Edw. Ch. 592, 594; Crain v. Carana, 35 Barb, 410, 413; Townsend, 2 Sandf. 711, 713, 714; Evans, 3 Yeates, 507, 508; Parham, 6 Humph. 287, 297.

[33] Crain v. Carana, 36 Barb. 410, 413; Carson v. Murray, 3 Paige, 483, 503.

[34] Townsend, 2 Sandf. 711, 713, 714; *supra*, n. 32.

[35] Carson v. Murray, 3 Paige, 483, 503; Day v. West, 2 Edw. Ch. 592, 594; Evans, 3 Yeates, 507, 508; Parham, 6 Humph. 287, 297; Burdock v. Briggs, 11 Wis. 126, 132.

## NEGOTIABLE PAPER — PAYMENT OF DRAFT WITH FORGED INDORSEMENT.

### STAR FIRE INS. CO. v. N. H. NAT. BANK.

*Supreme Court of New Hampshire.*

The drawee, who, without notice of any forgery, has paid a draft to the holder, to whom it was negotiated by the forged indorsement of the payees' names, may recover of the holder the money paid upon the draft.

Assumpsit, for money paid by the plaintiffs upon the following draft:

The Star Fire Insurance Company.
Hartford, Nov. 13, 1879.

Pay to the order of Daniel W. Moulton and Samuel C. Goodwin, four hundred forty-six dollars and seventeen cents, being in full payment and satisfaction of all claims and demands against said company for loss and damage by fire on the 25th day of October, 1879, to property insured under Policy No. 114,050 of the Portsmouth, N. H., Agency of said company.

A. E. Williams, Sp. A.

To C. C. Kimball, Manager, Hartford, Conn.

Indorsed: A. F. Craig.
Daniel W. Moulton.
Samuel C. Goodwin.

The plaintiff's principal place of business and home office is at Hartford, Conn. The draft was made at Hartford by Williams, special agent of the company, upon Kimball, general manager of the company, to pay a loss upon a policy issued by Craig to Moulton and Goodwin, and was sent by Williams to Craig to be delivered to Moulton & Goodwin Craig was local agent of the company at Portsmouth, authorized to make contracts of insurance and issue policies, but having no authority to adjust and pay losses, and he had no authority to collect the draft in suit. He did not deliver the draft to Moulton and Goodwin, but indorsed his own name and forged the indorsement of the payees' names upon it, and delivered it to the defendant bank, whose cashier, supposing the indorsements to be genuine, passed the amount to the credit of Craig's account. The defendants sent the draft forward duly indorsed for collection, and, in the ordinary course and through the ordinary channels of business, viz., banks in Boston and Hartford, it came to the hands of the plaintiffs and was paid without knowledge or suspicion that the

indorsements were not genuine. Craig died. Moulton and Goodwin not receiving pay for their loss, the plaintiffs were compelled to pay it. Immediately on discovery of the forgery, the plaintiffs notified the defendants, presented the draft, and demanded repayment of the money paid upon it. The defendants refused, and brought this suit. A motion for a non-suit was denied, and a verdict ordered for the plaintiffs, to which the defendants excepted.

ALLEN, J. The defendants received the draft on a forged indorsement of the payees' names, and took no title to it. By indorsing it they warranted the genineness of all prior signatures. 2 Pars. N. & B. 589; Dan. Neg. Ins. § 730, 731, 1357; Bank v. Fearing, 16 Pick. 533; Lobdell v. Baker, 1 Met. 193; Bank v. Morton, 4 Gray, 156; Merriam v. Wolcott, 3 Allen 258; Herrick v. Whitney, 15 John. 240; Murray v. Judah, 6 Cow. 284; Canal Bank v. Bank of Albany, 1 Hill 287; Aldrich v. Jackson, 5 R. I. 218; Thrall v. Newell, 19 Vt. 202. The defendants' indorsement was a representation that they had paid or accounted, or would pay and account, to the payees for what they might receive upon it. Relying upon their indorsement and the representations which it legally carried, the plaintiffs paid the draft, and the defendants received the money or an equivalent credit, through their correspondents who collected it. With knowledge or notice of the forgery, the plaintiffs might have resisted payment. They had no knowledge or notice or even suspicion of the character of the first indorsement, and were in no fault for not knowing it. They had a right to rely on the defendants' indorsement; and with that reliance they paid the draft, and the defendants received the money paid through an innocent mistake. By reason of the forgery the payees failed to receive the money due them, and the plaintiffs were compelled to pay again the amount of the draft, and might then rely on the promise of the defendants arising from their endorsement for repayment.

The defendants, having credited the amount of the draft to Craig and indorsed it for collection, must be understood to have received the draft as cash, and were holders for value. If they received it as agents for collection, they did not disclose the agency; and as between them and the plaintiffs, they must be taken to have acted as principals. Canal Bank v. Bank of Albany, *supra*. The banks at Boston and Hartford subsequently indorsing the draft for collection were agents of the defendants (Hoover v. Wise, 91 U. S. 308, and cases cited), and the defendants were the proper parties to be sued.

Craig was not an agent of the plaintiffs for any purpose connected with the draft, except to deliver it to the payees. His agency was local, and limited to the business of effecting insurance risks and the issuing of policies. It did not include in its scope the power to adjust losses, nor to indorse, collect, or accept the plaintiffs' drafts, nor did the plaintiffs in any way authorize him to perform those acts, or hold him out as having authority to perform them. He was a stranger to the draft, and his acts in indorsing his own name and forging the names of the payees upon it did not relieve the defendants of their duty of diligence to make inquiries respecting the genuineness of the indorsements. His acts not being within the duties of his agency, and being unauthorized, did not bind the plaintiffs, and his knowledge of the forgery was not the knowledge of the plaintiffs.

The plaintiffs notified the defendants of the mistake in payment as soon as the forgery was discovered, and being in no fault for not knowing it sooner, there was no unreasonable delay in the notice to the defendants. Canal Bank v. Bank of Albany, *supra*; Merchants' National Bank v. National Eagle Bank, 101 Mass. 281. This is not the case of a drawee paying a draft on which the name of a drawer is forged, or which was put into circulation by the drawer with a forged indorsement upon it. In such case the drawee, having ordinarily the best means of knowledge of the drawer's signature, cannot recover from an innocent holder to whom he has paid the draft. Hortsman v. Henshaw, 11 How. 177; Coggill v. American Exchange Bank, 1 Comst. 113. An acceptance of the draft warrants the genuineness of the drawer's signature, but not of an indorser's made subsequent to the issuing of the draft and before acceptance or payment; and the payment by the drawee to one who holds by a forged indorsement of the payee's name entitles him to recover the sum paid, if seasonable notice of the forgery is given.

The defendants and plaintiffs both paid the draft by mistake, neither knowing nor suspecting the forgery. If there were any question of negligence the d fendants preceded the plaintiffs, who relied on the former's indorsement, which carried with it assurance of the genuineness of the preceding indorsements. The equities between the parties are not equal. McKleroy v. Southern Bank of Ky., 15 La. Ann. 458; Dan. Neg. Ins. sec. 1362. The defendants have received the plaintiffs' money, which in equity and good conscience they can not retain, and the plaintiffs made a reasonable demand for it before suit. On the facts reported no legal defence to the suit was shown, and a verdict for the plaintiffs was properly ordered.

Judgment on the verdict.

## CRIMINAL LAW—OBTAINING MONEY UNDER FALSE PRETENSES—INDICTMENT.

### PEOPLE v. JORDAN.

*Supreme Court of California, Oct. 8, 1874.*

**An indictment for obtaining money under false pretenses, charging that defendant, with intent to de-**

fraud one K. of his property, did unlawfully, knowingly and designedly, falsely pretend and present to him that certain bonds of a railroad were of the market value of $650; that any bank in San Francisco would lend that amount on them, that the road of said company, issuing said bonds, was in running order, and was paying expenses; and that K loaned him $365 thereon, is good.

Appeal from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendant. The opinion states the facts.

*Attorney General* and *B. C. Darwin*, for the appellant; *John M. Lucas*, for the respondent.

MORRISON, C. J., delivered the opinion of the court:

The prosecution in this case is under section 532 of the penal code, which provides that "Every person who knowingly and designedly, by false or fraudulent representations or pretenses defrauds any other person of money or property, or who causes or procures others to report falsely of his wealth or mercantile character, and by thus imposing upon any person obtains credit, and thereby fraudulently gets into possession of money or property, is liable," etc.

The above section, which is substantially copied from the English statute, and finds a place in the penal codes or criminal enactments of other states, was considered by the Supreme Court of Massachusetts in Commonwealth v. Drew, 19 Pick., 182, and it was there held, that to constitute the offense described, four things must concur, and four distinct averments must be proved: "First, there must be an intent to defraud; second, there must be an actual fraud committed; third, false pretenses must be used for the purpose of perpetrating the fraud, and, fourth, the fraud must be accomplished by means of the false pretenses made use of for the purpose, viz., they must be the cause which induced the owner to part with his money." And Mr. Bishop speaking of this offense, says: "In spite of somewhat varying terms, the essential elements of most of the statutes defining this offense, are the same. And the indictment to cover them as construed, must set out a pretense or pretenses, which it alleges to be false, and known to the defendant to be so, made to a person named, for the purpose of defrauding him or another, by means whereof he obtained from the defrauded person some specified thing of value of a sort included in the statutory inhibition. Herein the statutory words and phrases should be employed, and the facts be given with such minuteness and directness as to satisfy the common law rule of pleading;" 2 Bishop on Criminal Procedure, sec. 163.

If the indictment in this case is subjected to the test laid down in the foregoing authorities, it will be found to contain all that is required in such an instrument. The indictment charges that the defendant, at a certain time and place therein mentioned, with intent to defraud Joseph Kreling of his property, did unlawfully, knowingly and designedly, falsely pretend and represent to him that two certain bonds which he, Jordan, then and there had and produced to said Kreling, each of which purported to be a bond of the Arizona and Nevada Railroad and Navigation Company, and promise to pay James G. Fair, or the holder thereof, one thousand dollars, the same being duly signed and executed, (giving a copy thereof), and did then and there unlawfully, knowingly, designedly, falsely and fraudulently represent and pretend to said Joseph Kreling that each of said bonds was then and there, in said city and county of San Francisco, of the market value of six hundred and fifty dollars, and that any bank in San Francisco would lend that amount on each of said bonds, and further, that the road of said company issuing said bonds was in running order and was paying expenses. And the said Joseph Kreling then and there believing said false pretenses and representations, and being deceived thereby, was induced, by reason of such false pretenses and representations so made, etc., to loan and deliver and did then and there deliver to said Jordan, on the pledge and security of said bonds, the sum of thirteen hundred and sixty-five dollars in money. It is further charged that said money was secured and obtained by the defendant, unlawfully, knowingly and designedly, to defraud said Kreling. The indictment then proceeds to deny the truth of the false and fraudulent representations and pretenses charging that said bonds at the time and place the same were pledged, had not any market value whatever; that it was not true that any bank in the city of San Francisco would loan any money thereon, and the company issuing said bonds had no road that was in running order, or that was paying expenses, all of which facts the said Jordan then and there knew.

We cannot see in what respect the indictment is defective, and are of opinion that the court below erred in sustaining the demurrer thereto.

It is true that the authorities may be somewhat conflicting, and that in many of them very nice and not entirely satisfactory distinctions are drawn between cases that are, and cases that are held not to be, within the statute; and as was said by Dewey, J., in the case of Commonwealth v. Norton, 11 Allen, 267; "It may be difficult to draw a precise line of discrimination applicable to every possible contingency, and we think it safer to leave it to be fixed in each case as it may occur." But we have found no case that holds such representations as are charged in this case, not indictable. The following principles and authorities may be cited in further support of the views herein expressed:

A false pretense is defined to be "a representation of some fact or circumstance calculated to mislead, which is not true;" Commonwealth v. Drew, 19 Pick., 179. What is said to be a fuller and practically better definition is the following: "A false pretense is such a fraudulent representation of an existing or past fact, by one who knows

it not to be true, as is adapted to induce the person to whom it is made to part with something of value;" 2 Bishop on Criminal Law, sec. 415. In the case of Reg v. Evans, 8 Cox's C. C., 257, note to 2 Bishop's Cr. Law, p. 235, it is said: "Had the prisoner represented the note to be of five pounds value, when she knew it was not of that value, and the jury had found the false pretense, and that the note was of less value than five pounds to her knowledge, it would have been sufficient to sustain a verdict of guilty." In the case of Commonwerlth v. Stone, 4 Metcalf, 43, the Supreme Court of Massachusetts held that the passing of a bill of a broken bank at its nominal value by one who represents it to be of such value, yet knows it to nearly if not quite worthless, is an indictable pretense under the statute, although the bill may be of some value. "A representation that a horse is sound, by one who knows it not to be true, is within the statute and is indictable. State v. Stanley, 64 Maine, 157.

The doctrine that, in the language of Russell, the pretense "need not be such an artificial device as will impose upon a man of ordinary caution, is fully established, at least in the English courts. And the pretense need not be such as cannot be guarded against by common prudence: 2 Bishop's Cr. Law, section 436. "It is substantially settled that any false representation, extending beyond mere opinion, concerning the quality, value, nature or other incident of an article offered for sale, whereby a purchaser, relying on the representation, is defrauded, is a violation of these statutes:" Id., section 447. "A mere opinion is not a false pretense; but any statement of a present or past fact is, if false:" Id., section 454. "There need be only one false pretense; and although several are set out in an indictment, yet if any one of them is proved, being such as truly amounts in law to false pretense—the indictment is sustained:" Id., section 418. A false representation that one Conlin was a liquor-dealer, doing business as such in Boston, was held to be within the statute: Commonwealth v. Stevenson, 127 Mass , 449.

We have examined the numerous cases cited by the learned counsel for defendant, but find none of them going to the extent claimed.

Other questions are made in the brief of defendant's counsel, but they do not properly arise. We have considered the only questions presented by the record on this appeal, and are of opinion that the judgment sustaining the demurrer appealed from should be reversed. It is so ordered.

## WEEKLY DIGEST OF RECENT CASES.



1. ACTION—PROCURING CONVICTION BY PERJURY.
In an action against several defendants for conspiring together to procure the plaintiff to be indicted and convicted of a crime, by false and perjured testimony, and for causing him to be thus indicted and convicted by such false and perjured testimony, the gist of the action is the alleged tort and not the alleged conspiracy, and the defendants are not liable. *Garing v. Fraser*, S. J. C. Me , Feb. 23, 1884; Reporter's Advance Sheets.

2. ADMIRALTY JURISDICTION—CONTRACT TO CARRY CARGO AND MAKE SALE—FAILURE TO ACCOUNT—LIABILITY OF VESSEL.
The owner and master of a vessel contracted to carry a cargo to its place of destination, to sell it, and return the proceeds to the consignor, less his freight. The master sold the cargo, but did not return or account for the proceeds. *Held*, that the vessel was not liable, and that a court of admiralty had no jurisdiction. *The New Hampshire*, U. S. D. C., E. D. Mich. 21 Fed. Rep. 924.

3. ADMIRALTY JURISDICTION—MORTGAGE OF VESSEL FOR PURCHASE MONEY.
A mortgage of a vessel to secure purchase money is not a maritime contract, and a court of admiralty will neither decree a foreclosure thereof, nor enforce the mortgagee's right of possession under it. *Britton v. Venture*, U. S. D. C., W. D. Pa., Oct. 1884; 21 Fed. Rep. 928.

4. ALTERATION OF INSTRUMENTS—ADDITION OF SIGNATURE TO NOTE SECURED BY MORTGAGE—EFFECT.
The addition without his consent of the name of a surety to a note given by one partner to another, does not affect the validity of a mortgage given by the maker, and such surety to secure such note, at least in the hands of an innocent lender of money to the partnership upon the security of both note and mortgage. *Mersman v. Werges*, U. S. S. C., Nov. 3, 1884; 5 Sup. Ct. Rep. 65.

5. ALTERATION OF INSTRUMENTS — VOLUNTARY PAYMENT OF ALTERED PAPER—CONTRIBUTION.
Where one of several makers of a promissory note, given for the accommodation of the payee, and altered after its delivery, voluntarily pays the same at maturity, he cannot recover on it against another maker thereof, who has not consented to or ratified the alteration. *Davis v. Bauer*, S. C. Ohio, Sept. 30, 1884; 6 Ohio L. J. Rep. 159.

6. ASSIGNMENT— CONSTUCTION— RESERVATION OF RIGHTS OF LIEN-HOLDERS—VOID LIEN.
A deed of assignment for the benefit of creditors, which excepts from the operation of the assignment "all existing liens," does not give priority to a mortgage lien which is void as against credi-

tors although valid as against the assignor. *Blandy v. Hall*, S. C. Ohio, Oct. 21, 1884; 6 Ohio, L. J. Rep. 105.

7. COMMON CARRIER—BOAT OWNERS.
The owners and managers of a boat used for their own purposes and those of others who agree to pay certain rates for the transportation of their goods from one point to another, and who are not shown to have been held out as common carriers, cannot be declared to be such at the instance of any of such agreeing parties. *Flautt v. Lashley*, S. C. La. 18 Rep. 652.

8. COMMON CARRIER — LIABILITY OF RAILROAD COMPANY ON CONTRACT TO CARRY BEYOND TERMINUS—SHIPPING RECEIPT.
A railroad company that contracts to carry goods over its own and connecting roads, and deliver the same within a certain time at a destination beyond the terminus of its own line, is liable to the shipper for damages caused by delay in transportation over such connecting roads. Whether the contract of shipment provided for a carriage beyond such terminus is a question for the jury. Upon the determination of this question the provisions of the receipt delivered by the carrier to the shipper are not conclusive upon the latter. *Pereira v. Central Etc. R. Co.*, S. C. Cal. Nov. 7, 1884; 4 W. C. Rep. 372.

9. COMPOUNDING FELONY—DESTRUCTION OF EVIDENCE OF FORGERY.
The delivery of a forged promissory note to the forger upon payment by him, which he was authorized to make, with the intent to enable him to destroy and suppress it, and with the intent to hinder and prevent the prosecution of the forger, does not constitute the compounding of a felony. *Deere v. Wolff*, S. C. Iowa, Oct. 24, 1884; 21 N. W. Rep. 168.

10. CONSTITUTIONAL LAW—PROHIBITION OF SPECIAL LEGISLATION—LIENS.
An act which assumes to give a lien for certain kinds of work, and which, although it has an enacting clause applicable to the entire State, yet contains a section excluding from its operation one or more counties, either specifically by name, or by excluding from the operation counties having a population greater than a certain number, is a violation of art. 3, sec. 7, of the Constitution, which prohibits "any local or special law authorizing the creation of liens." *Davis v. Clark*, S. C. Pa. Oct. 6, 1884; 18 Rep. 667.

11. CRIMINAL LAW—LARCENY—OBTAINING PROPERTY BY FALSE PRETEXT.
Under an ordinary indictment for theft, a conviction may be had on proof showing that the taking, though with the owner's consent, was obtained by false pretext, or with intent to deprive the owner of the value of the property and to appropriate it to the benefit of the taker. *Morrison v. State*, Tex. Ct. App. Oct. 25, 1884; 4 Tex. L. Rev. 280.

12. DEED—GRANT WITH ALL PRIVILEGES—BOOM.
Where one, owning the right of fastening a boom to the shore of an adjoining owner and exercising that right in connection with his booms along his own shore, conveys his land "together with all the booms and piers thereon, and privileges thereto appertaining as heretofore used by me," the right of fastening the boom as enjoyed by the grantor passes to the grantee. *Hoskin v. Brown*, S. J. C. Me. Mar. 4, 1884; Reporter's Advance Sheets.

13. DEVISE —CONSTRUCTION OF— SALE, AND REPURCHASE OF LAND DEVISED.
A testator devised to his son "all that portion of real estate he has enclosed and now has in his possession, supposed to contain one hundred and forty acres, more or less." By other provisions of the will an intention was manifested to dispose of all the property the testator possessed. Subsequent to the date of the will he sold a portion of the land devised, and afterwards bought the same back. *Held*, that the portion so sold and bought back passed to the son under the foregoing devise. *Hopper's Estate*, S. C. Cal. Nov. 6, 1884; 4 W. C. Rep. 368.

14. EVIDENCE—BURDEN OF PROOF OF NEGLIGENCE —BAILMENT.
In an action to recover for the baggage lost by a warehouseman, the plaintiff may rest upon proof of a failure to deliver—the burden is then upon the bailee to show that the failure was occasioned by a cause from liability for which he is protected by law or contract, and when he has so done in a way not to implicate himself in a charge of negligence, the plaintiff cannot recover, unless he shows negligence on the part of the bailee. *National S. S. Co v. Smart*, S. C. Pa. Nov. 10, 1884; 15 Pitts. L. J. 150.

15. EVIDENCE—EXPERT TESTIMONY.
Whether goods were handled by a sheriff as well "as goods usually are when attached," is not a matter for expert testimony, and a question put to an expert witness to elicit his opinion upon that question is improper. *Dow v. Julien*, S. C. Kan. Nov. 7, 1884; 4 Pac. Rep. 1000.

16. EVIDENCE—EXPERT TESTIMONY—CALCULATION TO FRIGHTEN HORSES.
In an action against a person leaving an object on the roadside at which it is alleged that a certain horse taking fright, reared, fell, and died, causing in his fall personal injuries to the plaintiff, witnesses familiar with horses may be called upon to give their opinion based upon facts observed by themselves as to whether the object in question was calculated to frighten horses; whether the mere fall of the horse could have killed him; and whether a horse could have been frightened to death by the object in question. *Piollet v. Suniners*, S. C. Pa. Oct. 6, 1884; 15 W. N. C. 241.

17. EVIDENCE — INSANITY — NON-PROFESSIONAL WITNESSES.
Non-professional witness, having sufficient opportunities of observing a person alleged to be insane or *non compos mentis*, may give their opinions as to his sanity or mental condition, as the result of their personal observation, after first stating the facts which they observed. *Baughman v. Baughman*, S. C. Kan. Nov. 7, 1884; 4 Pac. Rep. 1003.

18. EQUITY—REFORMATION OF DEED—MISTAKE.
The absolute owner of land conveyed it by a deed which, after granting all his estate in the land, declared in a subsequent clause that the interest and title intended to be conveyed was only that acquired by virtue of a certain sheriff's deed, which was in fact an undivided one-half only. All parties to the conveyance intended that it should embrace such undivided one-half only, and supposed that the deed was so drawn as to effectuate such intention. *Held*, that although the limitation of the grant was ineffectual because inserted after and not in the granting clause, it was nevertheless conclusive as to the intention of the parties, and

whether the mistake was one of law or of fact, the deed might be reformed to accord such intention. *Green Bay Co. v. Hewitt*, S. C. Wis. Oct. 14, 1884; 21 N. W. Rep. 216.

19. EQUITY — JURISDICTION OF CIRCUIT COURT — JUDGMENT AT LAW.
The circuit courts of the United States have no power to set aside, reverse, or modify a judgment at law or decree in chancery after the term at which it was entered, save only in the cases specified in Bronson v. Schulten, 104 U. S. 410. *Allen v. Wilson*, U. S. C. C. E. D. Mich. April 7, 1884; 21 Fed. Rep. 888.

20. EXTRADITION—RIGHT OF ASYLUM TO FUGITIVE FROM JUSTICE.
A fugitive from justice has no asylum in a foreign country when he is guilty of an offense for which he is liable or subject to extradition, by treaty between this and the foreign government. If he is illegally and forcibly removed from such foreign country, that country alone has cause of complaint, and he can not complain for it. *Kew v. People*, S. C. Ill. Sept. 3, 1883; Reporter's Head Notes.

21. LANDLORD AND TENANT—EVICTION—DISPOSSESSION OF PART OF PREMISES BY LANDLORD.
D rented a house from W, and W became a boarder and lodger with D. W being dissatisfied with the boarding was ordered to leave; he refused saying that he was owner of the house and would not leave, but would retain the room he then occupied, but would leave as a boarder. *Held*, that the retaining of the room under these circumstances was not an eviction. *Diehl v. Woods*, S. C. Pa. Nov. 10, 1884; 15 Pitts. L. J. 152.

22. LARCENY—WRONGFUL CONVERSION OF HIRED PROPERTY.
One hiring a horse and selling it before the journey is performed, or sells it after, before it is returned, commits no larceny when the felonious intent came on him subsequent to receiving it into possession. *Morrison v. State*, Tex. Ct. App. Oct. 25, 1884; 4 Tex. L. Rev. 280.

23. LIMITATION — FIRE INSURANCE — ACTION — PROOFS OF LOSS.
A policy of fire insurance provided that payment for losses should be due in sixty days after proofs of the loss were received by the company, and that no suit on the policy should be sustainable unless brought within twelve months after the loss occurred. *Held*, the twelve months should be reckoned from the day of the fire, and not from the expiration of the sixty days after delivery of proofs to the company. *Chambers v. Atlas Ins. Co.* S. C. Conn. 18 Rep. 646.

24. MALICIOUS PROSECUTION—TERMINATION—NOL. PROS.
A simple *nol. pros.* is not such a determination of an indictment as will entitle the accused to maintain an action for malicious prosecution. *Garing v. Fraser*, S. J. C. Me., Feb. 23, 1884; Reporter's Advance Sheets.

25. MASTER AND SERVANT—FELLOW-SERVANTS—INSPECTORS AND BRAKEMEN.
Inspectors of cars in the yards of the company and brakemen on its trains are to be regarded as fellow servants engaged in a common service. *Little Miami R. Co. v. Fitzpatrick*, S. C. Ohio, Oct. 28, 1884; 6 Ohio L. J. Rep. 115.

26. MUNICIPAL CORPORATION—PERSONAL INJURIES—VELOCIPEDE.
It can not be said as a matter of law that a velocipede on a sidewalk is in an unlawful place, and therefore, that a person who is obliged to step aside to let it pass, and who by such stepping aside falls into a hole, a defect in the highway, can not recover. *Purple v. Greenfield*, S. J. C. Mass. 1 Daily L. Rec. No. 42.

27. PRACTICE—CA. SA. — EMBEZZLEMENT — ACTION EX-CONTRACTU.
Where a plaintiff waives the tort and sues by action in form *ex contractu* to recover money wrongfully converted to his own use by defendant, and the record shows that a tort has been actually committed, he is entitled, under the Illinois statute, to a *ca. sa.* or execution against the body of defendant, notwithstanding the form of action adopted. *Barney v. Chapman*, U. S. C. C. N. D. Ill., Oct. 1884; 21 Fed. Rep. 903.

28. PRACTICE—DIRECTING VERDICT—NEGLIGENCE.
When, in an action for personal injuries caused by defendant's negligeuce, npon the whole testimony the court will not feel justified in sustaining a verdict for the plaintiff, it should direct a verdict for the defendant; and that, although there may be some evidence which would raise a possibility or a suspicion that the plaintiff was entitled to recover. *Sullivan v. Crysolite Co.*, U. S. C. C. D, Col., Oct. 16, 1884; 21 Fed. Rep. 892.

29. SUNDAY LAW—FRIGHTENING HORSES ON SUNDAY.
In an action against a private citizen for leaving an obstacle in the road whereby plaintiff's horse has been frightened and caused injury, the defendant can not set up as a defence the fact that the plaintiff was at the time travelling on the highway for pleasure on Sunday. *Piollet v. Suniners*, S. C. Pa., Oct. 6, 1884; 15 W. N. C. 241.

30. TAX — NAVIGATION OF RIVER—CONFLICT WITH UNITED STATES LAWS.
A city can not make a charge as the price of the privilege of navigating a river in accordance with the terms of the party's license of the United States. *Moran v. New Orleans*, U. S. S. C., Nov. 3, 1884; 4 Sup. Ct. Rep. 38.

31. TORT—PLACING OBJECTS ON STREET—FRIGHTENING HORSES—LIABILITY.
A property owner who has a lawful right to expose an object on or along a public highway within view of passing horses, for a temporary purpose, is bound only to take care that it shall not be calculated to frighten ordinarily gentle and well-trained horses. He is not bound to guard against frightening skittish, vicious, timid, and easily frightened horses. *Piollet v. Suniners*, S. C. Pa. Oct. 6, 1884; 15 W. N. C. 241.

32. VOLUNTARY PAYMENT—ILLEGAL EXACTION OF TAXES—REQUISITES FOR RECOVERY.
To recover money paid to the city under protest it must be shown that it was involuntarily paid under protest as an unauthorized exaction, and without any understanding that the city should under any circumstances retain the money. *Boswell v. Philadelphia*, S. C. Pa. Feb. 4, 1884; 10 Pitts. L. J. 153.

## QUERIES AND ANSWERS.

### QUERIES.

46. A owns real estate valued at $5000. To secure an indebtedness B takes mortgage upon the same for its full value. Long time after the execution of the mortgage and before maturity, A sells the real estate to C subject to the mortgage of B. B brings foreclosure and the real estate goes to sale. At the sale no bidders were present save B, who made a bid of $1,000, and to whom the real estate was sold at that price. The actual value of the property is $5,000 and was the same at time of sale. Query: As against C, and his rights in said real estate has the mortgage lien of B been extinguished by the foreclosure, sale and bid of $1000 by B, and if C redeems from that sale, can B further disturb C in his title thereto? An answer with full citations will accommodate an attorney who represents the interests of C.

47. Sec. 13, Art. 19. Constitution of Arkansas declares: "All contracts for a greater rate of interest than ten per centum per annum shall be void as to principal and interest." The act of the legislature of the same State, approved Feb. 9, 1875, enacts that no person shall directly or indirectly take or receive in money any greater sum for the loan or forbearance of money than 10 per cent. that all contracts whatever whereupon or whereby there shall be reserved or agreed to be reserved any greater sum for the loan or forbearance of any money than 10 per cent. shall be void. Under this state of the law would a stipulation inserted in a promissory note that if it were not paid at maturity a per cent. exceeding the rate of ten per cent. per annum would be charged as a penalty for non-payment be void? Would the rule be different if there was no such stipulation in the promissory note, but the parties thereto after the instrument reached maturity agreed upon an extra rate of interest exceeding ten per cent. per annum as a penalty for non-payment.

SUBSCRIBER.

### QUERIES ANSWERED.

Query 45. [18 Cent. L. J. J. 338.] A, living in Kansas, orders one gallon of whiskey from a wholesale dealer in Missouri, the whiskey is sent to the local express agent in Kansas, with instructions to collect on delivery, which he does and remits the amount collected to the dealer in Missouri. Where is the sale made?

Answer. Contracts and movable property have no *situs*; Porter v. Silliman, 44 Miss. 272. If the contract or act is valid where done it is valid everywhere; *Id.* The question, what law governs a contract, depends theoretically at least upon the intention of the contracting parties. An agreement to perform an act, without designating a place for performance, is presumed to be made with reference to the law of the place at which the agreement is made; Hyatt v. Bank, 8 Bush. 193. If the contract is to be performed in part in the state where it is made, and in part in other states, the rule that the construction of a contract is to be governed by the law of the place where it is to be performed does not apply; and the contract as a whole is to be governed by the law of the place where it is made. Morgan v. R. Co., 2 Woods 244. But see Pomeroy v. Ainsworth, 22 Barb. 118. When negotiations for a contract are carried on between parties living in different states, partly by correspondence, and partly by oral communications through an agent, the contract is regarded as made in the state where it first takes effect so as to become a binding obligation upon both parties. Waldron v. Petchings, 9 Abb. Pr. N. S. 359. However, if a contract is by its terms to be wholly performed in a different state from that where it was made, the law of the place of performance will govern rather than that of the place where the agreement was made. Kanaga v. Taylor, 7 Ohio St. 134. But if the agreement is silent as to the place of performance it will be presumed that it was intended that performance should be in accordance with the law of the place where it was made. De Sobrey v. DeLaistre, 2 Har. and J. 191; Herschfield v. Dexel, 12 Ga. 582; White v. Perley, 15 Me. 470. A sale consists in the transfer by mutual agreement of the ownership of personal property for a stipulated price. 2 Schoul. P. P. 186. It may be complete so as to transfer title notwithstanding further acts such as delivery or payment remain to be done before the contract is completely executed. *Id* 222. Bestelson v. Bowers, 81 Ind. 512; Wing v. Clark, 24 Me. 366; Newcomb v. Cabell, 10 Bush. 460; Miller v. Koger, 9 Humph. 231; Simmons v. Swift, 5 B. & C. 62. While the law will not presume that title has passed until the goods are delivered and the price paid yet the intent of the parties in that regard will control; and unless there is something in the contract to show the contrary a right of ownership in the goods will vest in the purchaser, and a right to the price in the seller, as soon as a valid bargain is made. 2 Schoul. P. P. 230; 2 Kent 495. And a stipulation that the seller shall convey the goods sold to a certain place is not inconsistent with a previous transfer of ownership. 2 Schoul. P. P. 242; Dyer v. Libby, 61 Me. 43. See Fragans v. Long, 4 B. & C. 291.

Ordinarily delivery to a common carrier is treated as delivery to the purchaser; (2 Schoul. P. P. 256, 268) but that holds good only when the goods are forwarded through specified carriers or contemplated channels. Comstock v. Affoelter, 50 Mo. 441; Williams v. Feinaman, 14 Kan. 288; Cobb v. Arundel, 26 Wis. 553; Strong v. Dodds, 47 Vt. 348; Garrison v. Selby, 37 Iowa, 529; Johnson v. Cuttle, 105 Mass. 447; Magruder v. Gay, 33 Md. 344. If the goods are to be shipped by the seller at his own expense to the purchaser's place of business, the latter becomes the place of delivery. Devine v. Edwards, 101 Ill. 138. But the buyer may waive delivery at the place specified, and accept the property elsewhere, and thereby render the sale complete. Robinson v. Herschfelder, 59 Ala. 503. If the contract specifies no place of delivery, it will be presumed to be at the seller's store, or at the place where the goods may be at the time of sale. 2 Kent. 505; Janney v. Sleeper, 30 Minn. 473; Cahen v. Platt, 40 N. Y. Sup. Ct. 483.

When a sale is so far complete that the ownership of goods will pass from the seller to the buyer must be determined by the intention of the parties as disclosed by their negotiations; for if the seller, when delivering the goods to the carrier, intended that the title or ownership of the goods should vest in the buyer that intent will prevail unless there be something in the terms of the contract, or in the control which he retains over the property, inconsistent with such intent. 2 Schouler 272; England v. Mortlandt, 3 Mo. App. 490. Shipping goods C. O. D. has been regarded as manifesting the intention of the vendor to control the *jus disponendi*. Wagner v. Hallack, 3 Col. 176; Kelly v. Dening, 2 McCrary 453. But parties may contract for a lien which will be effectual after a delivery of the property. Gregory v. Morris, 96 U. S. 619; Little v. Page, 44 Mo. 412. And the law secures to him, independent of any matter of contract, the right to stop the goods while in transit in case the purchaser has become insolvent and to have the same returned to him. This right is in the nature of a conditional

lien, 2 Schoul. pp. 590. Consigning the goods to a specified person makes that person *prima facie* owner, 14 C. L. Jour. 23. But while the form of the shipping bill or bill of lading is important as a manifestation of the interest of the shipper in regard to his claims upon the property, yet, if from the whole agreement it can be seen that the carrier was the agent of the buyer in the reception of the goods, and that the seller was to have a lien until the price was paid, then the right to stop the goods in the carrier's hands would not be inconsistent with the theory that the title had passed to the purchaser subject to the exercise of this right on the part of the seller. In considering where a sale was made so as to determine what is the law of the sale-contract, a knowledge of the terms of the order and of the course of dealing of the parties is important. If it was understood between them that the sale was to be regarded as complete at the place of business, or that the title to the goods sold should there pass and the seller thereafter should only have a lien on the goods for the purchase price, the law of that place would be the law of the contract; but if in delivering the ordered goods to the carrier he intended to retain the ownership until the price was paid, then the contract would be so far executory that the law of the place where delivery and payment were to be made would govern the contract. Thus where a resident of Michigan while in New York bought a quantity of liquors and labels for bottles, and the labels were delivered to him in New York, but the liquors were shipped to him in Michigan. *Held*, the contract was governed by New York laws. Garfield v. Paris, 96 U. S 557. So where a salesman for an Illinois house while in Iowa took an order for liquors which was filled by the house shipping the liquors to the purchaser in Iowa, he to pay charges and to take risks, etc. *Held*, an Illinois contract. The court said: "It is well settled that to constitute a contract requires the making and accepting of a proposition: that is there must be a concurrence of two minds upon the same thing. Where an order is made by letter it does not constitute a contract until it is accepted. When it is accepted and the letter containing the acceptance is placed in the mail the contract is complete; and it is very plain on principle that the contract is made where it is accepted and not where the offer was made; for it is there that the two minds meet on the same thing and the contract is consummated." Tegler v. Shipman, 11 Am. R. 118 (33 Iowa 194). See Hill v. Spear, 9 Am. R. 205 (50 N. H. 253). So an agent for a New York house, while in New Hampshire, took an order for liquors, subject to the approval of his house, which order was forwarded to the house in New York. The goods were sold by sample and the purchaser was to examine them after their arrival at his store in New Hampshire and approve or reject them. He was, also, to pay freight. The New York house packed and shipped the goods by carrier to the store in New Hampshire. *Held*, a New York contract. Boothby v. Plaisted, 12 Am. R. 140 (51 N. H. 496). So the agent of one who was authorized to deal in liquors in Boston, but not in Natick took an order at Natick for liquors subject to the approval of the Bostonian at a price named. The Bostonian filled the order and shipped the goods by carrier, the buyer paying freight. *Held*, a sale in Boston. "If the negotiations were subject to his approval they did not amount to a sale or binding contract until that approval had been given." Frank v. Hovey, 128 Mass. 263; S. P. Garbracht v. Commonwealth, 42 Am. R. 550 (96 Pa. St. 449). In Lynch v. O'Donnell, 127 Mass. 311, it was held that a sale was completed at the seller's store, he having there received an order for the goods, and it being agreed that the sales were "to be understood as made there." In Foster v. Ropes, 111 Mass. 10, and Riddle v. Varnum, 20 Pick. 280 it is said that the general rule that the title of chattels will not pass on sale thereof so long as the seller by the terms of the contract is to do anything to put it in condition to be delivered will not prevail, where by the terms of the contract the title was to vest immediately in the purchaser, notwithstanding something remained to be done to the goods by the seller after delivery. But where a New York dealer took an order, while in Massachusetts, for liquors to be shipped to a resident of Massachusetts, and the dealer selected the goods and placed them on board of the cars in New York, directed to the buyer in Massachusetts who paid the freight. *Held* to be a New York contract, because the title would not pass so long as anything remained to be done to identify the goods sold, and because there was no appropriation of particular property under the contract until the dealer's return to New York. Alberger v. Marrin, 102 Mass. 70. So where a New York dealer received orders from a resident of Massachusetts, requesting him to deliver to the writer in New York at the railroad, certain liquors and the dealer marked the address of the writer on the packages and delivered them to the purchaser. *Held* to be a New York contract. Ely v. Webster, 102 Mass. 304. So where it had been agreed between the plaintiff, a dealer in New York, and the defendant, a citizen of Massachusetts, that the plaintiff would sell the defendant such liquors at specified prices as he might order, such liquors to be delivered on board of the cars in New York and addressed to the defendant in Massachusetts, defendant to pay freight. Orders were sent by letter and telegraph and goods were shipped pursuant to agreement. *Held* the sale was made in New York. Brockaway v. Maloney, 102 Mass. 308. Where A, a Rhode Island dealer agreed, while in Massachusetts, to sell to a dealer there liquors at specified prices, and pursuant to such agreement selected from his stock in Rhode Island such liquors and delivered them on board of cars. Plaintiff paid freight, but it was understood it should be refunded to him. *Held* a Rhode Island contract. Dolan v. Green, 110 Mass. 322. See Kline v. Baker, 99 Mass. 253. An agent who had no authority to sell solicited an order for liquors from a resident of Massachusetts and forwarded the same to his house in New Haven, Conn., which filled the order and shipped the goods. The court say of the contract: "The only agreement to sell or act of sale would be at New Haven. The first existence of a contract would be when the plaintiff at New Hampshire assented to the defendant's proposal, transmitted through the agent; and the sale would be complete when the liquors were delivered at the railroad directed to the defendant." Finch v. Mansfield, 97 Mass. 89. See Rorer on Inter-State Law, 59; Ober v. Smith, 78 N. C. 313; Hunt v. Jones, 34 Am. R. 635 (12 R. I. 265); Milliken v. Pratt, 28 Am. R. 241 (125 Mass. 374); Bell v. Packard, 31 Am. R. 251 (69 Me. 105). In Webber v. Howe, 24 Am. R. 590 (36 Mich. 150) a somewhat different view was taken from that enunciated in Alberger v. Marrin, *supra*. An Ohio dealer while in Michigan took an order which he filled by shipment from his house in Ohio. The court said: "The circuit judge charged the jury that if the order for the liquors was taken in Michigan, was filled in Ohio, and the liquors were shipped in Ohio and the defendant received them in Detroit and paid the freight, then the plaintiff would be entitled to recover. This instruction must assume that the contract was an Ohio contract, being completed by the acceptance and filling the order in Ohio. Had the order been sent from

this State to dealers in Ohio and filled there, or had an agent of the Ohio parties, who had no authority to agree on sales, taken the order in this State and transmitted it to his principals who accepted and filled it, we think the instruction might have been sustained. But the order was taken here by one of the plaintiffs in person and the acceptance, as well as the giving of it, took place in this State. This case seems to leave out of view the matter of selection and appropriation of the liquors shipped to the contract of sale. In Rindskopf v. DeRuyter, 39 Mich. 1, a verbal order for liquors was given in Michigan to the agent of a Wisconsin firm, subject to the approval of the firm, and also subject to the acceptance or rejection of the goods on their arrival in Michigan. *Held*, that delivery of the goods to a carrier did not take the case out of the Wisconsin statute of frauds; and as a Michigan contract it was void under the liquor laws. In the case put in the query I would say that it was a Kansas contract. There was nothing to show that title was to pass on delivery to the carrier in Missouri, or to overcome the presumption that the seller retained title until goods were paid for and delivered.

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## LEGAL EXTRACTS.

### TACT IN TRIALS.

An advocate of eminence, who was long noted for his many trial victories in criminal and fraud cases very lately gave me the two rules of his practice that he considered important to remember, For clearness before a jury and courtesy to a court they are models and worth saving.

"I have observed," he began, "that lawyers almost invariably talk over the jury and reason, like Senators and Congressmen, with big law sentences, while juries reason like women with one or two simple examples like this: 'If one man failed to meet his note when due and cheated someone, they knew another of the same class of business would certainly be likely to be just as dishonest.'

"I found farmers had one language, carpenters had another, country merchants had another, and laborers another—there are the average jurymen. I adopted and used their catch words and phrases, not as 'clap trap,' or a 'trick' but 'to talk in their own language.' I found it took better; they understood me and knew my meaning better. I never lost my suits by a jury's ignorance of what I contended for.

"Another reason was this: Juries respect with unbounded confidence the leanings of a judge. There is a reverence that is often too exalted, but it is real. This was my experience and I fell in with it. I found it useless to argue after a ruling. I fell in with the views of the court all I could. I will give this instance:

At a trial of importance before Judge L., just before adjournment, one evening, he said: I may as well announce to counsel that I will rule so and so as to the law of this case.' This was fatal to my position, but I bowed to the court pleasantly and said: 'That relieves us of dwelling upon that part Your Honor,' and we went home.

"Opposing counsel argued very timely and relied upon his victory of the ruling and I followed. Prefacing with the remark that our duty was much lessened and I felt pleased at it and at the candor with which the learned judge had lessened the controversy, to which ruling I made no objection. But the leading issue—the great vital pivotal point, and the merit of the issue, the court must leave to the solid sense of the twelve men before me—men not so learned in the law, but far broader and more experienced in affairs and dealings of man with man, than either lawyers or courts could ever be expected to become, for a jury of lawyers could never agree. The courts of the several States were often in conflict, and in this manner separated the juries' duty from that of the court and won a splendid verdict over an adverse charge by not appearing to be hurt by it; a verdict that was quickly followed by a just settlement."

If these instances are not clear and instructive I wil not render them less so by any attempt at pointing out their moral. J. W. DONOVAN.

## NOTES.

——We have received the opinion of Judge VanVorst in the case of Loubat v. LeRoy, popularly known as the "Union Club Case," in which a thorough review of the law of clubs is made. It is published by Douglass Taylor of New York, and being a pamphlet of 127 pages, it will pay everyone interested in the subject to send for it.

——We have received a pamphlet of 100 pages called Mailles Divorce Laws of Louisiana, which is an excellent *vaae mecum* for the Louisiana lawyer. It is a thorough annotation of the divorce laws of the State and furnishes a "synoptical history of the laws of divorce, together with evidence, practice, pleadings, and forms, and the decision of the Supreme Court of Louisiana on this subject up to," 35 La. Ann. Joseph Mailles, Esq., is the author and Geo. Mueller of New Orleans, La., the publisher.

——A young Vermont lawyer has just had his first case. It was a case of measles, and he had to go home and let his mother nurse him.

——In Terre Haute a lawyer isn't considered to amount to much until he whips the opposing counsel, shakes his fist under the nose of the judge and dismisses the jury by inviting them out to drink.—*Ex.*

——"Papa," said a little boy, looking up from his Sunday-school lesson, "are all our deeds in this world recorded?" "Not always," replied the old man, who is a real estate lawyer, "I lost $350 once by failing to record a deed."—*Ex.*

Lawyer: "So your father is dead?" "Yes." "You seem to take it rather cheerily." "Yes; he left considerable property." "And do you think on that account he should not be mourned?" "Oh, yes; he should be mourned, but I am not the one to do it." "Then who on earth is? You are his only child." "Oh, you lawyers will have to do the mourning this time. You see he didn't leave a will."—*Ex.*

——"My dear boy," said the gray-haired old man, placing his hand on the young attorney's shoulder, and looking him kindly in the eye, "don't get discouraged, there's always room at the top." "Yes," replied the promising young lawyer, "I got on to that act the first time I stopped at a hotel."—*Ex.*